In the Supreme Court of the United States.

OCTOBER TERM, 1924

DEWITT T. LAW, PLAINTIFF IN ERROR
v.
THE UNITED STATES

No. 550

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

ARGUMENT

I

Plaintiff in error not entitled to rating of total permanent disability under his war risk insurance contract

The sole question here involved is whether plaintiff in error is so suffering from total permanent disability as to entitle him to the payments prescribed in the insurance policy issued to him under the so-called War Risk Insurance Act. It appears to be his contention, in substance, that he was insured as a "common laborer" and as his injuries render it impossible, so he claims, to now follow that vocation, he is therefore entitled to be rated as one suffering from "permanent total disability." The trial court seems to have taken the

view that he is so entitled, and in reaching its conclusion to have disregarded those facts and the history of the man which should constitute material elements in determining "permanent total disability." The court also held invalid the definition of "permanent total disability" contained in the regulation of the Director dated March 9, 1918. (R. pp. 73, 74, and 85.) The Circuit Court of Appeals, however, entertained a different view, and concluded plaintiff in error is not entitled to recover. (R. p. 82 et seq.) Its opinion requires little, if any, elaboration. The facts which forbid making the former occupation of plaintiff in error the dominant ground for a "permanent total disability" rating are thus succinctly stated by the appellate court (R. p. 83):

> Before enlistment Law had worked on a farm and at the time of enlistment his education was less than first year high school. In the winter of 1916–1917 he was in school and continued his studies until the month of April, 1917. He had taken a five months' course, consisting of several months of bookkeeping and stenography, and after discharge from the Army he completed his course in bookkeeping at the Normal School in Kansas. He has taken vocational training under the auspices of the Government in the law school in the University of Montana, where he has been in attendance from (fol. 165) September 27, 1919, to the date of the trial of the present case during which time

> he has been allowed by the Government $80 each month from September 27, 1919, to June 1, 1920, and $100 per month from June 1, 1920, to the date of trial. He appeared in his own behalf in the prosecution of this action in the District Court and before the Court of Appeals.

Plaintiff in error seeks to assimilate his case to those arising under ordinary accident and health insurance contracts which have found their way into the courts. He cites such cases in his brief at pages 33 et seq. His contention in this respect must fail, for at least two reasons, viz:

1. War risk insurance contracts are not identical with, and therefore subject to the same rules of construction as, such ordinary insurance contracts, but as so well stated in *White* v. *United States,* 299 Fed. 855, 857:

> The policy of insurance sued on, however, is not the ordinary form used by insurance companies generally. It is a contract made pursuant to the provisions of a Federal statute, and must be construed with reference to such statute. The primary purpose of the act was to afford protection to the soldier and his dependents, and the premiums charged constitute a comparatively small part of the expense involved. As was stated by Senator Williams, in charge of the bill, in the Senate, it was not the purpose of the Government to go into the insurance business, but rather to afford protection not

otherwise obtainable to the soldiers and their dependents (55 Cong. Rec. p. 7690), or, as was said by Comptroller Warwick:

"It is not an out-and-out contract of insurance on an ordinary business basis; neither is it a pension, but it partakes of the nature of both." Op. to Sec'y Treas., July 5, 1919.

The application for insurance is not subject to rejection, or acceptance, at the discretion of the Government, but the right, if exercised within the prescribed time, requires the issuance of the insurance in accordance with the application. It is nonassignable, is not subject to the claims of creditors, and the rights under it may be terminated by certain designated unlawful conduct on the part of a soldier's widow. The application, which is made a part of the contract, in itself provides that the insurance is granted under authority of the act of Congress, and subject to all the provisions of the act and to any amendments thereto, and to all regulations thereunder, now in force or which may thereafter be adopted.

(2) The extent to which the contract was subject to existing and future laws made in relation thereto, as well as to the regulations then existing and thereafter made, is very fully and ably discussed by Judge Donahue, speaking for the Circuit Court of Appeals, Sixth Circuit, in the case of *Helmholz et al.* v. *Horst et al.*, 294 Fed. 417.

The character of these war risk insurance contracts is thus further elucidated in *Helmholz* v. *Horst,* 294 Fed. 417, 420:

> In order to insure the accomplishment of the beneficial purposes of the War Risk Insurance Act, it was further provided therein that the terms and provisions of such contracts of insurance should be subject in all respects to the provisions of the act or any amendments thereto, and also subject to all regulations thereunder, now in force or hereafter adopted, all of which, together with the application for insurance and the terms and conditions published under authority of the act, should constitute the contract. All of these provisions and conditions were written into the certificate issued to Alfred R. Marshall, and became and are a part of the contract. For this reason subsequent amendments of the War Risk Insurance Act and subsequent regulations affecting this contract, which is still in force, do not impair the obligations of an existing contract, but are in direct conformity with its terms, and in furtherance of its purpose and intent.

2. In the cases upon which plaintiff in error relies, the insured was, at the time of injury, engaged in certain manual labor, and nothing appeared to indicate he had any qualifications for other lines of toil, or could then reasonably be expected to acquire such qualifications. The courts properly refused to speculate upon what the insured might through

study or otherwise prepare themselves to do. Such is not the case at bar. The record here not only indicates he had abandoned, when he entered the military service, any purpose to follow in the future the occupation of a farm laborer, but had taken active steps to prepare himself for a more important and remunerative career. (R. pp. 57, 58, and 83.)

The trial court asserts the Government has rated his disability as temporary because through what the Government is doing for him, he "may arrive at the bar." (R. p. 74.) We submit he *has* arrived at the bar, and as cogent proof of this point to the manner in which he has handled his case from its inception including the preparation of briefs. These facts fortify rather than destroy the correctness of the rating of temporary total disability given him by the Bureau, whose decision should not now be lightly overthrown. *Forbes* v. *Welch,* 286 Fed. 765, 767.

The dominant error in the decision of the trial court seems to have been in treating plaintiff in error as a common laborer. He has thoroughly demonstrated a higher business or professional rating. A final criticism of the action of the trial court is to be found in the fact that it rendered judgment not upon the strength of the showing made by plaintiff in error, but upon apparent weakness in the defense showing.

The Circuit Court of Appeals in its well reasoned opinion in the case at bar satisfactorily disposes of the issues involved, and it is respectfully submitted that its judgment should be affirmed.

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DECEMBER, 1924.

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